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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MANUEL MATA GONZALEZ, Defendant and Appellant.	B207933 (Los Angeles County Super. Ct. No. TA093259)
In re MANUEL MATA GONZALEZ, on Habeas Corpus.	B216555

APPEAL from a judgment of the Superior Court of Los Angeles County. Jerry E. Johnson, Judge. ORIGINAL PROCEEDING; petition for writ of habeas corpus. Appeal affirmed in part, reversed in part and remanded with directions. Writ petition denied.

Lise M. Breakey, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Chung L. Mar and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Manuel Mata Gonzalez was arrested following a carjacking and high speed chase through the streets of Paramount. He was convicted on count one of carjacking and on count two of evading a peace officer. As to count one, gang and weapon allegations were found true. On appeal, defendant challenges the sufficiency of the evidence to support the gang enhancement under Penal Code section 186.22, subdivision (b)(1) as well as the propriety of his sentence on count one. Defendant also filed a petition for writ of habeas corpus, alleging ineffective assistance of counsel at trial. Respondent also challenges defendant's sentence on count two and claims the trial court failed to order sufficient court security fees.

We conclude (i) substantial evidence does not support the gang enhancement, (ii) the sentence on count two is unclear due to disparity between the reporter's transcript, abstract of judgment and sentencing minute order, and must be reversed, and (iii) the trial court failed to assess sufficient court security fees. We deny the petition for writ of habeas corpus.

Background

Defendant was charged in a two-count information. Count one charged defendant with carjacking in violation of section 215, subdivision (a).[1] As to count one, it was also alleged that a principal personally used a firearm (a handgun) within the meaning of section 12022.53, subdivisions (b) and (e)(1), and that defendant committed the offense for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1)(C). Count two charged defendant with evasion of a peace officer with a willful and wanton disregard for the safety of others and property in violation of Vehicle Code section 2800.2, subdivision (a).

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1 Unless otherwise noted, all section references are to the Penal Code.

1. Prosecution Case

In the late afternoon on June 17, 2007, while her son was inside the OK Market in the City of Paramount, Graciela Avila was sitting in her son's car just outside the market. Ms. Avila was waiting in the front passenger's seat and the keys were in the ignition. Without warning, a man opened the front driver's side door, got inside the car, pointed a gun at Ms. Avila and said "Get out or I'm going to . . . waste you." Ms. Avila complied. She did not get a good look at the man's facial features, but saw that he was wearing a grey sweatshirt and black cap, had a dark complexion and a certain "look" about him. As she scrambled out the passenger side door, Ms. Avila noticed another person's feet by the door. She was not sure whether that person also got inside the car. Ms. Avila went inside the market to find her son, who then called the police.

Sheriff's Deputy Ramirez was on duty in the area in a marked patrol car. He saw a car matching the description of the carjacked car and began to follow it as it drove down Orange Avenue. The carjacked car drove fast and eventually turned onto San Juan Street, where it collided with a parked car, but kept going. Deputy Ramirez turned on his siren and enforcement lights and continued to follow the car down San Juan Street, which at that location is a one-way, one-lane residential street, with a posted speed limit of 15 miles per hour. The carjacked car raced down the street at about 40 to 50 miles per hour, swerved back and forth, and sped through two stop signs.

The car drove almost to the end of the street, where it collided with a parked car. Deputy Ramirez saw two men run from the crashed car. The man who exited from the front driver's side wore a bulky dark grey sweatshirt. The other man wore a plaid-type flannel, long-sleeved shirt and exited from the front passenger side. Both men ran down a driveway and into a backyard near where the car had crashed. Because he was alone and knew a gun had been used in the carjacking, Deputy Ramirez did not immediately follow the men, but instead waited for backup. The backyard was fenced so that the only way in and out of the yard was the driveway where Deputy Ramirez was waiting. Backup arrived within one minute and the group of officers followed after the men into the backyard, where both men were apprehended.

Deputy Ramirez directed the man wearing the grey sweatshirt to stand toward the end of the driveway and wait there while the deputy returned to the backyard. Deputy Ramirez testified that, "at some point [the man wearing the grey sweatshirt] had walked away, or I think he left on a bike or something. He was not there anymore." Deputy Ramirez found the man either riding or walking with a bicycle about a block down the street, where he was again apprehended.

The man wearing the grey sweatshirt was later identified as defendant and the other man was identified as Eduardo Salazar.[2] Deputy Ramirez told another deputy that he saw "the defendant get out of the driver's side of the vehicle, and the other suspect—I believe his name was Salazar—exit the front passenger part of the vehicle." After defendant and Salazar were detained, Ms. Avila made a field identification of defendant. From inside a deputy's car, about 50 feet away, Ms. Avila recognized defendant as the man who pointed a gun at her and ordered her out of the car. At trial, Ms. Avila also identified defendant as the man who carjacked her and Deputy Ramirez identified defendant as the man who fled the car from the driver's side.

The deputy who booked defendant stated defendant had a tattoo on his upper-left back depicting the letters CVS, which stands for the Compton Varrio Segundo gang. In fact, the parties stipulated that defendant "has a tattoo of CVS on his back." The same deputy booked the second suspect, Mr. Salazar, and also noticed the letters CVS had been "etched" into his arm. Sheriff's Deputy Garcia testified he had met defendant on at least five previous occasions, and each time defendant identified himself as a CVS gang member. Deputy Garcia also testified that Salazar goes by the moniker "Paisano" or "Crazy" and has a CVS tattoo etched on, or carved into, his forearm. He also testified that the house behind which defendant and Salazar ran is a well-known CVS gang residence, where CVS member "Clumzy" lives and where, on several occasions, CVS

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[2] At the time of his arrest and booking, defendant said his name was Roberto Delacruz. Months later, he said his name was Miguel Mata Gonzalez. The record does not indicate whether the second suspect, Mr. Salazar, faced charges stemming from the carjacking and chase.

members have been arrested. The backyard and surrounding area of the residence are covered in CVS graffiti.

The stolen car was returned to its owner, Mr. Avila, later that day. He testified that, although he had left his cell phone and a portable stereo in his car when he went inside the OK Market, nothing was missing from his car when it was returned.

A gang expert testified about the CVS gang generally and defendant specifically. He testified that the CVS gang is "involved in all the different types of crimes we have in our community, including the violent crimes such as robbery, assaults, murder, drug sales, things like that." He also testified about the convictions of two CVS members—one conviction was for sale of a controlled substance and the other was for carrying a concealed weapon in a car.

The expert opined both that defendant is a member of the CVS gang and that defendant committed the carjacking for the benefit of the gang. He explained that gangs use stolen cars to commit other crimes—"stolen cars are a tool of gangs"—and that gang violence earns respect for the gang, intimidates people in the neighborhood, and allows the gang to continue its criminal enterprise.

2. Defense Case

Defendant testified on his own behalf and told a very different story. Defendant testified that, on Sunday June 17, 2007, he was wearing a grey sweatshirt and riding home from work on a bicycle he had borrowed. He rode through the park near the residence on San Juan Street where the car chase had ended. As he rode by the scene, an officer stopped and searched him. The officer did the same to another person nearby. The officer walked back to the house and defendant left with the bicycle. Soon after, however, believing defendant had stolen the bicycle, the officer stopped defendant again, about three blocks away. Defendant told the officer he had borrowed the bicycle and could take him to speak with the owner. The officer handcuffed defendant, put him in the patrol car and put the bicycle in the trunk. They drove to the bicycle owner's house, where the officer spoke with the owner and returned the bicycle to her. The officer got

back in the patrol car and accused defendant of stealing a car, which defendant denied knowing anything about.

Defendant denied involvement in the carjacking or car chase. He also denied being a current gang member. He testified that, although he had been a member of the CVS gang 23 years ago, for four or five years, he left the gang when he married and got a job. He testified his CVS tattoo is from 1980. He also explained that, because he has lived in the area for many years, he knows CVS member Clumzy, who lives at the CVS residence on San Juan Street, and says "Hi" to him.

When asked at trial what would stop him from lying to protect himself, defendant answered "I can't lie to people. What am I going to lie about? I can't lie." Immediately after that testimony, he admitted giving a false name to the arresting officers. He explained that he told the officers his name was Roberto Delacruz because he did not want to go to jail for a probation violation. He also testified on cross-examination that, in addition to giving a false name, he also gave the booking officer an inaccurate address and inaccurate employment information.

3. Verdict and Sentencing

The jury found defendant guilty on both counts and found true all special allegations. The court denied probation and sentenced defendant to five years in state prison on count one (carjacking in violation of section 215, subdivision (a)). The court added 10 years for the section 12022.53, subdivision (b) weapon enhancement, another 10 years for the section 186.22, subdivision (b)(1)(C) gang enhancement and a life term under section 186.22, subdivision (b)(4). Thus, the court sentenced defendant to 25 years to life on count one.

The record is unclear as to the sentence on count two. The reporter's transcript states simply that the trial court stayed defendant's sentence on count two (but it does not indicate what the sentence is). And the sentencing minute order indicates the court imposed a sentence of 25 years to life on count two, then stayed that sentence.

The trial court ordered defendant to pay a $200 restitution fine, a $200 parole revocation fine, a $20 court security fee, and a $20 DNA fee.

Discussion

1. Sufficiency of the Evidence

Defendant claims the evidence is insufficient to support the gang enhancement under section 186.22, subdivision (b)(1). According to defendant, while the evidence might have shown his gang membership, it did not show he committed the carjacking for the benefit of, at the direction of, or in association with a gang, or with the specific intent to promote, further or assist in any criminal conduct by gang members. We agree.

a. Standard of Review

We review a claim of "insufficient evidence by examining the entire record in the light most favorable to the judgment below. [Citation.] We review to determine if substantial evidence exists for a reasonable trier of fact to find the counts against the [defendant] true beyond a reasonable doubt." (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.) "Substantial evidence must be reasonable, credible, and of solid value. [Citation.] We also presume the existence of every fact the [jury] could reasonably deduce from the evidence . . . ." (*Ibid.*)

b. Section 186.22, subdivision (b)(1) Gang Enhancement

For the gang enhancement to apply, the prosecution was required to prove that defendant committed the carjacking "[1] for the benefit of, at the direction of, or in association with any criminal street gang, [2] with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) Because we conclude the evidence does not support a finding of specific intent under the second prong, we need not and do not address the first prong.

As defendant points out, this case is similar to *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*). In *Ramon*, a sheriff's deputy stopped the defendant, a gang member, and a fellow gang member because the deputy noticed the pickup truck they were driving matched one recently reported stolen. The deputy found an unregistered handgun under the driver's seat of the truck. At trial, a gang expert testified as to the primary crimes committed by the defendant's gang, which included drug-related crimes,

robberies, car thefts and witness intimidation, but did not include possession of stolen property. The expert also testified that the defendant and the other suspect were stopped in the heart of their gang territory and that gangs often use stolen cars to commit other crimes. A jury convicted the defendant of receiving a stolen vehicle, possession of a firearm by a felon, carrying a loaded gun while a member of a gang, and carrying a loaded gun for which he was not the registered owner. The jury also found true the section 186.22, subdivision (b)(1) gang allegation. (*Id*. at pp. 846-848.)

The Court of Appeal reversed the true finding on the gang enhancement, holding the evidence was insufficient to support it. The court concluded that, in order to affirm the gang allegation, "we would have to hold as a matter of law that two gang members in possession of illegal or stolen property in gang territory are acting to promote a criminal street gang. Such a holding would convert section 186.22(b)(1) into a general intent crime. The statute does not allow that." (*Ramon, supra*, 175 Cal.App.4th at p. 853.) The court stated that the gang expert "simply informed the jury of how he felt the case should be resolved" and that there were no facts from which the expert could discern whether the defendant and the other suspect were acting on their own behalf or on behalf of their gang the night they were arrested. (*Id.* at p. 851.) The court also noted that the "analysis might be different if the expert's opinion had included 'possessing stolen vehicles' as one of the activities of the gang." (*Id.* at p. 853.)

Similarly, here, the evidence does not support a finding that, in committing the charged offenses, defendant specifically intended to promote a criminal street gang. He did not announce himself as, or otherwise indicate to the victim that he was, a gang member. And the gang expert did not testify that CVS gang members typically commit carjackings or engage in high speed car chases. As in *Ramon*, the expert here simply indicated how he believed the jury should decide the case. There were no facts from which he could discern whether defendant and the other suspect were acting on their own behalf or on behalf of the CVS gang the day they were arrested.

Accordingly, following *Ramon*, we hold the gang enhancement is unsupported by the evidence and must be vacated.

2. Sentencing

a. Count One

Defendant argues the trial court erred in sentencing him on count one. In particular, defendant claims the trial court incorrectly applied both subdivision (b)(1)(C) and subdivision (b)(4) of section 186.22. In light of our conclusion that the section 186.22 gang enhancement was improper, however, this argument is moot and we do not address it.

b. Count Two

As respondent indicates, the trial court erred in sentencing defendant on count two. The jury convicted defendant on count two of evading a peace officer in violation of Vehicle Code section 2800.2, subdivision (a). No gang or weapons allegations were alleged as to that count. According to the reporter's transcript from the sentencing hearing, the trial court failed to sentence defendant on count two. As to that count, the trial court stated only the following: "Count 2, I intend to stay that. Count 2 will be stayed." Similarly, the abstract of judgment does not reflect imposition of a sentence on count two. However, the sentencing minute order states the trial court sentenced defendant to 25 years to life in prison on count two, then stayed that sentence. But it appears that a violation of Vehicle Code section 2800.2 does not carry such a sentence. (See Veh. Code, § 2800.2, subd. (a) [violation of the section carries a six months to one year sentence].) The record does not indicate how the trial court could (if it in fact did) impose a 25 year to life sentence on count two. Defendant does not address this issue.

Thus, whether the trial court failed to impose a sentence on count two (as reflected in the reporter's transcript and the abstract of judgment) or imposed then stayed a sentence of 25 years to life on count two (as reflected in the minute order), the judgment must be reversed and remanded for proper sentencing as to that count.

3. Court Security Fee

Respondent argues that, instead of one $20 court security fee, the trial court should have imposed two $20 court security fees—one for each conviction—for a total of $40. Defendant does not address this issue. We agree with respondent and direct the trial

court to impose a court security fee for each conviction for a total of $40 and to amend the abstract of judgment accordingly. (§ 1465.8, subd. (a)(1); *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [section 1465.8 court security fee applies even when trial court stays punishment on a conviction].)

4. Petition for Writ of Habeas Corpus

In his petition for habeas corpus, defendant claims he was deprived of his right to effective assistance of counsel because his trial counsel failed to file a *Pitchess* motion seeking discovery of Deputy Ramirez's personnel files. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) We disagree.

To state a claim of ineffective assistance of counsel, defendant must demonstrate that (a) his counsel's performance was objectively deficient and (b) defendant was prejudiced by his counsel's deficient performance. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*).) To show prejudice, defendant must show a reasonable probability that, but for his attorney's deficient performance, the result of the proceeding would have been different. (*Id.* at pp. 217-218.) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.] Specifically, '[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. . . .' [Citation.]" (*Id.* at p. 218.)

We deny the petition because we conclude defendant cannot satisfy the second prong of the ineffective assistance of counsel test—prejudice as a result of his attorney's alleged errors. As defendant points out, he cannot affirmatively show prejudice because the trial court was not asked to conduct and did not conduct a *Pitchess* review as to Deputy Ramirez. Neither defendant nor we know whether, during a review of Deputy Ramirez's personnel files, the trial court would have discovered relevant information. (Cf. *In re Avena* (1996) 12 Cal.4th 694, 730 ["There being no showing of possible prejudice, we reject petitioner's claim that [trial counsel] was constitutionally ineffective for failing to file a *Pitchess* motion."].)

Finally, we deny defendant's request for a *Pitchess* hearing. On remand, defendant cites no authority which supports his request. (Cf. *In re Avena*, *supra*, 12 Cal.4th at p. 730.)

Disposition

The section 186.22 gang enhancement is reversed. The sentence on count two is reversed. The judgment is otherwise affirmed. The case is remanded for resentencing. The trial court is directed to order a second $20 court security fee, for a total of $40 in court security fees. The trial court is also directed to amend the abstract of judgment and forward the amended abstract to the appropriate authorities.

The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.